Supreme Court, U.S.
FILED
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No.

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Melinda B. Wilde

IN THE

Supreme Court of the United States

October Term, 1995

LINCOLN LOAN CO.,

Petitioner,

v.

CITY OF PORTLAND,
a municipal corporation,

Respondent.

On Petition For Writ Of Certiorari
To The Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the "exclusionary rule" concerning suppression of illegally obtained evidence apply to administrative searches?

2. Can a search be justified as lawful on the basis of consent if the "consent" has been given only after the official conducting the search has asserted that he possesses a warrant?

List Of Parties

Petitioner: Lincoln Loan Company, an Oregon corporation with no parent companies and no non-wholly-owned subsidiaries.

Respondent: City of Portland, Oregon, a municipal Oregon corporation.

Interested party: Mary Ann Halinen, an individual.

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Smyth v. Lubber, 398 F.Supp. 777 (W.D.Mich. 1975) 9

Wong Chung Che v. Immigration and Naturalization Service, 565 F.2d 166 (1st Cir. 1977). 9

Constitutional provisions

United States Constitution, Fourth Amendment 1, 2, 10

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Amsterdam, A. Perspectives on the Fourth Amendment, 58 Minn L.Rev. 349, 417 (1974). 10

LaFave, Search & Seizure 2nd Ed. 7, section 1.7 9

Official and Unofficial Report Citations

Lincoln Loan Co. v. City of Portland, 138 Or App 688, 909 P2d 1243 (1996); petition for review denied, Oregon Supreme Court (A86240)(S43075).

Basis For Jurisdiction

1. Order denying petition for review in the Oregon Supreme Court was entered April 9, 1996.
2. Decision of the Court of Appeals was entered on January 24, 1996.
3. Supreme Court Rule 10(b) confers jurisdiction upon the United States Supreme Court to review on a writ of certiorari the decision of the Oregon Supreme Court and Oregon Court of Appeals in this case. The Oregon Supreme Court is the state court of last resort in Oregon. On April 9, 1996, the Oregon Supreme Court refused to review a decision of the Oregon Court of Appeals which decided an important Constitutional question in a way that conflicts with the decision of the United States Supreme Court, the United States federal courts and other state courts.

Constitutional Provisions Involved

United States Constitution, Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

This is a case involving a **warrantless** search. A City inspector, McKee, showed up at the petitioner's rental property with four uniformed police officers. McKee found a thirteen-year-old child at home and told the child that he had a search warrant and that the child could let McKee in, or the police would break down the door. Transcript at 14-15. The child allegedly said "Come on in, you don't have to break the door down." Tr. at 8. The government then claimed that they had thereby obtained consent to a **warrantless** search and returned the warrant unexecuted. Lincoln Loan Co. v. City of Portland, 138 Or App 688, 909 P2d 1243 (1996).

There are no facts in evidence proving that the child resided in the house with his mother as assumed by the Court of Appeals. There were no facts in evidence

proving that the mother gave the child authority to consent to a **warrantless search**. The only evidence of authority was testimony by the mother, quoted by the Court of Appeals, where the mother gave authority to allow a **search with a warrant**. Lincoln Loan Co. v. City of Portland, supra, 138 Or App 688 at 691 (1996). The mother also testified as follows:

> Question: "Did you give him [the child] instructions as to what he was to do if he did not have a search warrant."
>
> Answer: "Well, I just told him that if he didn't have a search warrant, that not to allow him in at that time." Transcript at page 30.

The Oregon Court of Appeals found that "The evidence supports a finding that the child's mother instructed him to consent if McKee said that he had a warrant. McKee so informed the child. The child consented, as he had been instructed to do." Lincoln Loan Co. v. City of Portland, supra, 138 Or App 688 at 691 (1996). "Because the child validly consented to the search by McKee, it was not error to refuse to exclude evidence obtained in the subsequent search." Id., 138 Or App 688 at 692 (1996). The government did not put

on any evidence that the search occurred under warrant. The search was **warrantless**. The child had authority to allow a search under warrant, but the facts in evidence prove that the child did not have authority to permit a **warrantless** search.

The Court of Appeals quotes language from the return of warrant as if it were in evidence at the hearing level. Lincoln Loan Co. v. City of Portland, supra, 138 Or App 688 at 690 (1996). There was no evidence of a search warrant or return of warrant at the administrative hearing. They were injected into this case for the first time as part of the Respondent's Appeal Brief.

The Court of Appeals was misled to believe that this was not a situation where it needed to determine what the child thought, because of the existence of the warrant. The Court of Appeals was misled, because there was no warrant involved in this search, except as a pretext to gain entry to the dwelling.

The issues raised herein, namely, (1) whether the search was consensual and, (2) whether the exclusionary rule applies in civil administrative hearings, were raised by the petitioner for the first time in the court of first instance which was the administrative hearing before the Portland City Code Hearings Officer. The issues were raised by petitioner's motion to suppress. Record at page 13-15. The administrative hearings officer found that the exclusionary rule does not apply in civil matters, but

also found that even if it did apply, the tenant's child consented to the search. Tr. at 29. On writ of review filed by the petitioner, the Multnomah County Circuit Court for the State of Oregon upheld the decision of the hearings officer. Petitioner appealed the decision to the Oregon Court of Appeals. The Court of Appeals did not decide whether or not the exclusionary rule applies in civil matters, but found that even if the rule does apply, there was valid consent to the search in this case. Lincoln Loan Co. v. City of Portland, 138 Or App 688, 691-2, 909 P2d 1243 (1996). Petitioner filed a Petition for Review with the Oregon Supreme Court. The Oregon Supreme Court denied review of the Court of Appeals decision on April 9, 1996. This petition has been filed within 90 days of April 9, 1996, as required by Rule 13(1).

ARGUMENTS

FIRST ARGUEMENT: **There can be no consent to a search by a governmental official who asserts that he possesses a search warrant.**

The United States Supreme Court clearly held that in criminal cases there can be no consent to a search by a governmental official who asserts that he possesses a

warrant. Bumper v. North Carolina, 391 US 543, 88 S Ct 1788, 20 L Ed 797 (1968). In Bumper, law enforcement officials went to Bumper's house and found Bumper's grandmother at home. A deputy announced "I have a search warrant to search your house." The grandmother responded, "Go ahead," and opened the door.

> "When a law enforcement officer claims authority to search a home under warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion, there cannot be consent." Bumper v. North Carolina, supra 391 U.S. 543 at 550 (1968).

In the present case, a municipal housing inspector, McKee, went to inspect a house owned by the petitioner, accompanied by four police officers, and found the tenant's thirteen-year-old son at home. McKee informed the child that he had a search warrant and that the child could either let him inside or the police officers would break down the door. Lincoln Loan Co. v. City of Portland, 138 Or App 688, 691, 909 P2d 1243 (1996). The child responded, "Come on in, you don't have to

break down the door." Tr. at 8.

In both Bumper and the present case, the government represented that it was not relying upon the warrant to justify the search, but upon the consent of the person in the house. The court said that a search conducted in reliance upon a warrant cannot later be justified on the basis of consent when it turns out that the government does not even attempt to rely upon the validity of the warrant or fails to show that there was even a warrant at all. Bumper v. North Carolina, supra 391 U.S. 543 at 549-50 (1968). Since the warrant was not returned in Bumper and was returned unexecuted in the present case, there is no way of knowing the conditions under which such warrants were issued, or to determine if they were based upon probable cause. Bumper v. North Carolina, supra 391 U.S. 543 at 549-50 (1968).

The Oregon Court of Appeals decided that the tenant's child validly consented to the search by McKee. Lincoln Loan Co. v. City of Portland, supra 138 Or App 688 at 692 (1996). The Court of Appeals held that the present case did not provide "a situation in which we must determine whether the child's will was overborne by a show of force." The Court acknowledged that McKee told the child he had a warrant and then the child allowed McKee inside as he had been instructed to do. Lincoln Loan Co. v. City of Portland, supra 138 Or App 688 at 691 (1996). The court did not consider what

effect the warrant had upon the child's will and his consent. The Court then condoned the government's deceitful claim that it did not use the warrant to gain entry, by failing to make a distinction between a **search under warrant** and a **warrantless search**, even though the child had been instructed only to permit the search under warrant. Tr. At 30, Id. 138 Or App 688 at 691 (1996).

SECOND ARGUEMENT: **The exclusionary rule applies in administrative searches just as it applies in criminal cases.**

Under federal law, the exclusionary rule has clearly been applied in cases involving administrative searches. Connor v. City of Santa Ana, 897 F2d 1487 (9th Cir. 1990)(applied the exclusionary rule in an administrative nuisance abatement hearing); One 1958 Plymouth Sedan v. Pennsylvania 380 U.S. 693, 85 S.Ct. 1246, 14 Led.2d 170 (1965)(applied the exclusionary rule in a forfeiture proceeding); Parish of Jefferson v. Bayou Landing Ltd., Inc., 350 So.2d 158 (La. 1977)(applied the exclusionary rule to a nuisance abatement action); Carlisle v. State ex rel. Trammell, 276 Ala. 436, 163 So.2d 596 (1964)(applied the exclusionary rule in a nuisance abatement hearing); Savina Home Industries, Inc. v. Secretary of Labor, 594

F2d 1358 (10th Cir. 1979)(applied the exclusionary rule in OSHA proceedings); OKC Corp. v. Williams, 461 F.Supp. 540 (N.D. Tex. 1978)(SEC proceeding); Wong Chung Che v. Immigration and Naturalization Service, 565 F.2d 166 (1st Cir. 1977)(Immigration); Schenk ex rel. Chow Fook Hong v. Ward, 24 F. Supp. 776s (D. Mass. 1938)(Immigration); Smyth v. Lubber, 398 F.Supp. 777 (W.D.Mich. 1975) and Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968)(Student suspensions and expulsions); Finn's Liquor Shop v. State Liquor Authority, 24 N.Y.2d 647, 301 N.Y.S.2d 584, 294 N.E.2d 440 (1969)(liquor licensing); See also LaFave, Search & Seizure 2nd Ed. 7, section 1.7.

Conclusion

The decision of the Oregon Court of Appeals reverses the holding of the United States Supreme Court on a nearly identical factual situation to the Bumper case. Bumper v. North Carolina, supra 391 U.S. 543 (1968). If the written opinion of the Oregon Court of Appeals is allowed to stand, it will openly encourage governmental officers to use defective search warrants to obtain entry to private property without force, and then claim that since force was not required, the officers received voluntary consent for the search, in which case

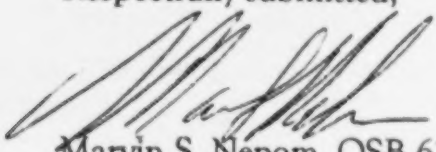
the officers do not need to execute the defective warrant. The paramount intent of the framers who drafted the Fourth Amendment was to prohibit the issuance of warrants without probable cause. Amsterdam, A. Perspectives on the Fourth Amendment, 58 Minn L.Rev. 349, 417 (1974).

The Oregon Court of Appeals makes no distinction between an instruction to obey the lawful authority of a warrant and authorization to consent to a warrantless search. The opinion of the Oregon Court of Appeals, therefore, cripples the security and privacy afforded by the Fourth Amendment of the United States Constitution, by allowing the government to lie, trick and deceive in order to accomplish what it cannot do legally. This case gives the United States Supreme Court the opportunity to clearly extend the protection afforded the defendant in Bumper to victims of governmental abuse in civil administrative matters.

A decision from this court, clearly stating whether or not the exclusionary rule applies in administrative searches is timely and necessary. A decision from this court, providing that governmental officials cannot use the pretense of a search warrant to obtain consent to a warrantless search, without showing that consent was not obtained by deceit, will preserve the integrity of the Fourth Amendment of the United States Constitution and its original purpose. For these reasons, the

petitioner respectfully requests that this court review and reverse the opinion of the Court of Appeals.

Respectfully submitted,



Marvin S. Nepom, OSB 62065
Counsel of Record

IN THE SUPREME COURT OF THE STATE OF OREGON

LINCOLN LOAN CO.,	) Multnomah
	) County
Petitioner-Appellant,	) Circuit Court
	) No. 9404-02984
v.	)
	) ORDER DENYING
CITY OF PORTLAND,	) REVIEW
a municipal corporation	)
	) CA A86240
Respondent-Respondent,	)
Respondent on Review,	) SC S43075
	)
and	)
	)
MARY ANN HALINEN,	)
	)
Interested Party.	)

The Court has considered the petition for review and

ORDERS that it be denied.

Dated this 9nd [sic] day of April, 1996.

/s/ Wallace P. Carson, Jr.
CHIEF JUSTICE

Fadeley and Unis, JJ. would allow

c: Melinda B. Wilde
Bill Manlove

FILED: January 24, 1996

IN THE COURT OF APPEALS OF THE STATE OF OREGON

LINCOLN LOAN CO., Appellant,

v.

CITY OF PORTLAND, a municipal corporation, Respondent,

and

MARY ANN HALINEN, Interested Party.

(9404-02984; CA A86240)

Appeal from Circuit Court, Multnomah County, Lee Johnson, Senior Judge.

Melinda B. Wilde attorney for appellant.

Bill Manlove, Deputy City Attorney, attorney for respondent.

Before Riggs, Presiding Judge, Landau and Leeson, Judges.

LEESON, J.

Affirmed.

DESIGNATION OF PREVAILING PARY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed [x] costs allowed, payable by: Appellant

MONEY JUDGMENT

Judgment #1

Creditor: CITY OF PORTLAND
Debtor: LINCOLN LOAN CO.
Costs: $160.00
Attorney fees: -0-
TOTAL AMOUNT: $160.00
Interest: Simple, 9% per annum, from the date of this appellate judgment.
Appellate Judgment COURT OF APPEALS
Effective Date: June 17, 1996. (seal)

APPELLATE JUDGMENT

LEESON, J.

Petitioner appeals from a judgment in which the trial court denied its writ of review and affirmed an order issued by the City of Portland's Code Hearings Officer that directed petitioner to correct numerous housing code violations and assessed a $500 civil penalty. ORS 34.010 to ORS 24.100. Petitioner claims that the hearings officer violated petitioner's rights under the Fourth Amendment to the United States Constitution and Article I, section 9, of the Oregon Constitution by refusing to exclude evidence obtained during an illegal search of the house occupied by petitioner's tenant. We review the circuit court's denial of the writ of review affirming the hearings officer's order as if that order were the judgment of the court in an action, ORS 34.100, and affirm.

McKee, a housing inspector for the City of Portland, obtained a search warrant to inspect the interior of a house owned by petitioner. He went to the house, accompanied by four police officers who were equipped with a battering ram. Tenant's 13-

year-old son, who also lived at the house, allowed McKee to enter and to take photographs of the interior. McKee returned the search warrant, explaining that he did not execute it, because he was "allowed access for inspection voluntarily by the person present." At the hearing, petitioner moved to suppress the evidence of interior code violations on the ground that McKee had conducted a warrantless search without valid consent. The hearings officer refused to suppress the evidence, finding that "even accepting the facts as stated in [petitioner's] motion to suppress,***the consent to the search of the interior of the premises was adequate.," because tenant's son had authority to consent to the search. The circuit court held that the hearings officer's order was "supported by substantial evidence in the record as a whole" and "did not violate petitioner's constitutional rights."

On appeal, petitioner contends that McKee's search was conducted without valid consent and that under Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution, it is entitled to have the evidence of that search suppressed. Respondent replied that petitioner lacks standing to assert that argument, because petitioner suffered no violation of its rights under either the state or federal constitutions.[1] Even assuming, without deciding, that the rule exculding evidence illegally obtained applies in circumstances such as these, this case turns on a factual determination: whether tenant's child had actual authority to consent to the search.

See State v. Will, 131 Or App 498, 505, 885 P2d 715 (1994) (whether a minor has actual authority to consent to a search is a question of fact).

Our review of the record reveals substantial support for the finding that tenant's 13-year-old son had actual authority to consent to the search. Tenant testified that she had told her son that

> "a gentleman would be coming by and he might have police with him and he might not, but if he had paper that he said was a search warrant, that he was to allow him into the home."

In its motion to suppress and at the hearing, petitioner stated" "[T]he child had been instructed, if he has a search warrant, you are to let them in." Petitioner also stated that "[w]hen Mr. McKee arrived with the police officers he had a search warrant with him, and informed the child of this fact." The record unambiguously supports that hearings officer's finding that tenant's child had been given actual authority to consent to the search.

Petitioner also argues that, under the circumstances, the child's consent was not valid, because the child was coerced into allowing McKee's entry by the presence of the police officers and the battering ram or that he merely acquiesced to the show of authority. We disagree. The police officers accompanied McKee to execute the warrant forcibly if necessary. The evidence supports a

finding that the child's mother instructed him to consent if McKee said that he had a warrant. McKee so informed the child. The child consented, as he had been instructed to do. This is not a situation in which we must determine whether the child's will was overborne by a show of force. *See State v. Freund*, 102 Or App 647, 652, 796 P2d 656 (1990) (officers' conduct did not invite response other than acquiescence, despite lack of search warrant). We need not speculate about whether the child would have allowed McKee to enter if he had not been accompanied by the police officers.

Because tenant's child validly consented to the search by McKee, it was not error to refuse to exclude evidence obtained in the subsequent search. We need not address petitioner's other arguments.

Affirmed.

City of
PORTLAND, OREGON
CORRECTED ORDER

CITY OF PORTLAND, petitioner

v.

LINCOLN LOAN CO., respondent
HEARING NO. 141061
PROPERTY: 8625 N. Fox Street, Portland, Oregon; Lot 10, Block 9, OAK PARK ADDITION NO. 2, City of Portland, Multnomah County, Oregon

HEARINGS OFFICER: William W. Shatzer
APPEARANCES:
Ms. Penny Stellmacher for the City.
Ms. Melinda Wilde, Attorney at Law, for the respondent, Lincoln Loan Co.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Pursuant to Rule 19(b), the findings of fact and conclusions of law entered orally on the record at hearing are incorporated herein by this reference.

ORDER:

1. Respondent is hereby ordered and directed to cause all excessive clutter, junk, trash, and debris to be removed from the interior of the structure so that the same no longer presents a fire hazard or impedes access to any of the structure's normal or emergency exits, and to have the removal verified by inspection by the City of Portland, Bureau of Buildings, not later than March 31, 1994.

2. Respondent is further ordered and directed to apply for and obtain all necessary building, electrical, plumbing, and heating and ventilating permits; to make all necessary repairs alteration, modifications, additions, and corrections required to restore the single-family dwelling on the above-described real property to a safe, sound, and legally habitable condition; and to have the same inspected and approved by the City of Portland, Bureau of Buidlings[sic], not later than May 31, 1994.
3. Respondent shall pay to the City of Portland a civil penalty in the sum of $500.00. Civil penalty shall be due and payable not later than March 28, 1994. Respondent shall be personally liable for this penalty, and, if not paid, the penalty will be made a lien against the above-described real property.
4. The hearings officer retains jurisdiction in this matter for the purposes of monitoring compliance and ordering additional relief and/ or assessing additional civil penalties, if appropriate.
5. This order has been mailed to the parties on March 11, 1994, and shall become final and effective on March 28, 1994. Any objections to this order must be in writing and received by the Code Hearings Office prior to the effective date.
6. This order may be appealed by writ review to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated Friday, March 11, 1994, nunc pro tunc
/s/ William W. Shatzer
Code Hearings Officer

WWS:db